ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments	)	MB Docket No. 05-263
FM Broadcast Stations	)	RM-11269
(Grants and Church Rock, New Mexico)	)	

To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

PETITION FOR PARTIAL RECONSIDERATION

Reynolds Technical Associates ("RTA"), engineering consultant to Smoke and Mirrors, LLC, College Creek Broadcasting, LLC and Desert Sky Media, LLC (designated as "Joint Parties II" in the *Report and Order*[1] in this proceeding), pursuant to Section 1.429 of the Commission's Rules, hereby submits this Petition for Partial Reconsideration to a new policy set forth in paragraph 23 of the *R&O*. The new policy relates to the very limited circumstances in which the Bureau will allow the downgrade of the class of a vacant allotment.[2] The Bureau has created a new policy without recognizing it has done so and as such has retroactively reversed its prior policy without any prior notice which violates basic administrative procedure. In addition, the new policy is contrary to the Commission's 307(b) mandate and should be reversed. In support hereof, RTA states as follows:[3]

[1] *Grants and Church Rock, New Mexico*, 22 FCC Rcd 9426 (MB 2007) ("*Report and Order*").

[2] *Id.* at ¶5.

[3] RTA is an interested person as defined by Section 1.429(a) because it and other clients that it represents will be adversely impacted in various pending cases if the Bureau's decision regarding the downgrade of vacant allotments is allowed to stand due to their reliance on established precedent. Further, it was not possible for RTA or its clients

1. In a Counterproposal filed in the above captioned proceeding, Joint Parties II proposed to, *inter alia*, downgrade a vacant allotment at Bagdad, Arizona from Channel 269C3 to Channel 290A. This downgrade was necessary in order to advance Priorities 1, 2, 3, and 4 of the Commission's allotment priorities.[4] More specifically, Joint Parties II's proposal as a whole would have resulted in (i) first aural service to 802 persons, (ii) second aural service to 395 persons, (iii) first local service to three communities with a total population of 4,702 persons, (iv) and a significant gain in overall service. Cleary, Joint Parties II's proposal significantly advanced the public interest. Furthermore, Joint Parties II's proposal to downgrade the vacant allotment at Bagdad was not a novel proposal. Rather, it was consistent with approximately 16 years of established precedent.[5] Yet, the Bureau for the first time held that it would only downgrade a vacant allotment when such an allotment had previously been available for application, a permit issued and the permit allowed to expire, which it claims was the basis for the decision in *Tiptonville*. The Bureau went so far as to state that "[i]n virtually all cases, we will not downgrade a "drop-in" channel."[6] This language implies that the Bureau has, in the past, consistently held that it will not downgrade vacant allotments. Other than *Tiptonville*, which the Bureau misinterprets (discussed below), the Bureau cites no case law to support its claim. This is because the exact opposite is true. The Bureau has consistently downgraded vacant allotments where the public interest would be served by such a downgrade.[7]

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to participate earlier in the proceeding because there was no prior notice that the Bureau intended to reverse its prior policy.

[4] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[5] *See, e.g., Weaverville, Palo Cedro, and Alturas, California*, 21 FCC Rcd 5131 (MB 2006) ("*Weaverville*"); *Dinosaur and Rangely, Colorado, et al.*, 19 FCC Rcd 10327 (MB 2004) ("*Dinosaur*"); *Bethel Springs, Martin, Tiptonville, Trenton, and South Fulton, Tennessee*, 17 FCC Rcd 14472 (MB 2002) ("*Tiptonville*"); *Othello, East Wenatchee and Cashmere, Washington, and Wallace, Idaho*, 6 FCC Rcd 6476 (MMB 1991) ("*Othello*").

[6] *Grants Report and Order*, at ¶5.

[7] *Supra*, note 5.

2. For example, in *Othello*, the Bureau downgraded a vacant channel at Wallace, Idaho from Channel 248C to Channel 248C2 to allow another station to upgrade its facilities. In *Tiptonville*, the Bureau downgraded a vacant allotment at Tiptonville, Tennessee from Channel 267C3 to Channel 247A to allow another station to upgrade and change community of license. More recently, in *Dinosaur* and in *Weaverville*, the Bureau downgraded vacant channels at Green River, Wyoming and Alturas, California, respectively, to allow other stations to upgrade and change community of license. All of these cases had public interest benefits, however, not to the degree of the public interest benefits proposed by the Joint Parties in this proceeding. Yet, for unknown and unexplained reasons, the Bureau decided in this proceeding that it will no longer permit the downgrade of a vacant allotment.

3. The Bureau attempts to rest its holding in this proceeding on its decision in *Tiptonville*. It claims, interpreting *Tiptonville*, that, in order to downgrade a vacant allotment, parties must first demonstrate that a construction permit for the vacant allotment in question has already been issued and that the permittee allowed the permit to expire thereby making the channel a vacant allotment again.[8] However, if in fact this were the holding in *Tiptonville*, the Bureau would have denied the proposals in *Dinosaur* and *Weaverville* because both were decided after *Tiptonville* and neither of the vacant allotments in those cases had ever been permitted.[9] Thus, the Bureau is mistaken when it implies that this policy has existed since *Tiptonville*. This is a new policy that is being promulgated in this proceeding without any notice to Joint Parties II, RTA, or the public. Proceeding in this way is troubling in two respects.

[8] *Report and Order*, at ¶5.

[9] In the *Dinosaur* proceeding the parties petitioning to downgrade the channel at Green River, Wyoming cited the Bureau's decision in *Tiptonville* as the authority that permitted downgrades of vacant allotments where the public interest would be served.

4. First, it violates basic administrative procedure. An agency undertaking to change its interpretation must afford the public adequate notice and an opportunity to comment.[10] The Bureau did not do so here. True, this was a rule making proceeding conducted under the informal rule making provisions of the Administrative Procedure Act.[11] However, the Bureau gave no notice that it intended to address this particular rule in this proceeding, which it must do in order to satisfy its procedural obligations.[12]

5. Second, making law on an ad hoc basis is unfair to the parties before the Commission. The *Report and Order* applied the new policy to the parties in this case, who had acted in good faith on the application of existing case law. Thus, the Bureau applied its new rule interpretation not merely prospectively (i.e., to future cases), but retroactively to the parties before it as well. While the Bureau may be entitled to engage in retroactive rule making given appropriate circumstances, it is an absolute requirement that it must make an affirmative finding on the record that the retroactive application of such a rule is appropriate.[13] It made no such finding here.

6. It is especially noteworthy to contrast the Bureau's approach just over two weeks ago in *Hemet, CA* (MB Docket 07-1, DA 07-2393) , where the Bureau decided to issue a Notice of Proposed Rule Making to consider a new policy, the use of actual terrain to calculate first and second NCE service benefits in reserving new allotments. The Bureau could have reversed its policy and adopted this new standard if that were the correct administrative procedure. However, the Bureau realized that the prudent and proper way to notify the public that it is considering a

[10] *See National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

[11] *See* 5 U.S.C. § 553.

[12] *See Chemical Waste Management v. EPA*, 976 F.2d 2, 33 (D.C. Cir. 1992). *See also* 5 U.S.C. § 553(c).

[13] *See Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986).

new policy is to solicit comment. That is all that RTA is asking the Bureau to do in this situation.

7. There is no reason why the Bureau should not solicit comment when Joint Parties II and other parties relied on case law in effect when the Counterproposal was filed. Joint Parties II made their decision and invested funds in reliance on the Commission's established allotment rules and procedures. The *Report and Order* does not explain why the public interest demands that the Bureau's new interpretation must be implemented immediately to the substantial detriment of a private party who reasonably relied on settled precedent. By continuing to reverse years of established case law without discussing that case law and even recognizing that it is creating new policy sows confusion and discourages private investment.[14] It is difficult to understand how the approach taken in this proceeding better serves the public interest. I hereby verify that I have read this Petition and to the best of my knowledge and belief, the facts contained herein are true and are made in good faith.

Respectfully submitted,

REYNOLDS TECHNICAL ASSOCIATES

By: Lee S. Reynolds

Lee S. Reynolds
Vice President

June 25, 2007

[14] *See Eldorado, Mason, Mertzon, and Fort Stockton, Texas,* 22 FCC Rcd 280 (MB 2007); *Sells, Arizona,* 19 FCC Rcd 22459 (MB 2004); *Gunnison, Crawford, and Olathe, Breckenridge, Eagle, Fort Morgan, Greenwood Village, Loveland, and Strasburg, Colorado, and Laramie, Wyoming,* 19 FCC Rcd 18542 (MB 2004); *Sells, Willcox and Davis-Monthan Air Force Base, AZ* 17 FCC Rcd 24575 (MB 2002), *MO&O,* 19 FCC Rcd 22459 (MB 2004), *Appl for Rev. pending.*

CERTIFICATE OF SERVICE

I, Lee S. Reynolds, hereby certify that I have on this 25th day of June, 2007, unless otherwise noted, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Petition for Partial Reconsideration**" to the following:

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